

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SECURITY INSURANCE COMPANY OF  
HARTFORD,

Plaintiff,

v.

SEA'N AIR TRAVEL, *et al.*,

Defendants.

No. C05-1062L

ORDER GRANTING IN PART  
SEA'N AIR TRAVEL'S  
CROSS-MOTION FOR SUMMARY  
JUDGMENT

This matter comes before the Court on "Security Insurance Company's Motion for Summary Judgment" (Dkt. # 16) and defendant Sea'N Air Travel's cross-motion (Dkt. # 29). The parties each seek a declaration regarding Security's obligation to defend and indemnify Sea'N Air in a suit brought in King County Superior Court by co-defendant Trident Seafoods Corporation. In the underlying state court action, Trident alleges that Sea'N Air failed to exercise reasonable care in hiring and supervising its employee, Scott Tenanglia, and failed to utilize accounting procedures that would have uncovered Tenanglia's theft of airline tickets owned by Trident.

Any party seeking to obtain declaratory judgment or against whom a declaratory judgment is sought may move for summary judgment in that party's behalf. Fed. R. Civ. P. 56(a) and (b). Summary judgment is appropriate when, viewing the facts in the light most

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1 favorable to the nonmoving party, there is no genuine issue of material fact which would  
2 preclude the entry of judgment as a matter of law. The party seeking summary dismissal of a  
3 claim “bears the initial responsibility of informing the district court of the basis for its motion,  
4 and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and  
5 admissions on file, together with the affidavits, if any,’ which it believes demonstrate the  
6 absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)  
7 (quoting Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to  
8 summary judgment if the non-moving party fails to designate “specific facts showing that there  
9 is a genuine issue for trial.” Celotex Corp., 477 U.S. at 324. In the context of this insurance  
10 coverage dispute, the relevant facts are undisputed and the parties agree that summary judgment  
11 is appropriate.

12           Having reviewed the memoranda, declarations, and exhibits submitted by the  
13 parties, the Court finds as follows:

14           (1)           Under the law of Washington:

15           [I]nsurance policies are construed as contracts. An insurance policy is construed  
16 as a whole, with the policy being given a fair, reasonable, and sensible  
17 construction as would be given to the contract by the average person purchasing  
18 insurance. If the language is clear and unambiguous, the court must enforce it as  
19 written and may not modify it or create ambiguity where none exists. If the clause  
20 is ambiguous, however, extrinsic evidence of intent of the parties may be relied  
21 upon to resolve the ambiguity. Any ambiguities remaining after examining  
applicable extrinsic evidence are resolved against the drafter-insurer and in favor  
of the insured. A clause is ambiguous when, on its face, it is fairly susceptible to  
two different interpretations, both of which are reasonable.

22 Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 665-66 (2000) (internal  
23 quotations and citations omitted).

24           (2) If Trident is able to prove the allegations of its underlying complaint against Sea’N  
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1 Air, the coverage provisions of Coverage C of Security's policy would be triggered and no  
 2 exclusion would apply. Policy No. TA 130534 and its subsequent reiterations provide that  
 3 Security will pay on behalf of Sea'N Air all sums to which Sea'N Air becomes legally obligated  
 4 to pay because of "any negligent act, error or omission of the 'insured' or any other person for  
 5 whose acts the 'named insured' is legally liable in the conduct of 'travel agency operations' by  
 6 the 'named insured.'"<sup>1</sup> Coverage C. Security apparently concedes that Trident's allegations of  
 7 negligent hiring, negligent supervision, and failure to implement proper accounting procedures  
 8 against Sea'N Air, if true, would bring the claims within this coverage provision of the insuring  
 9 agreement. Security argues, however, that revised exclusion (q) applies and relieves it of its  
 10 defense and coverage obligations.

11 Revised exclusion (q) excludes from coverage under the professional errors and  
 12 omissions provisions of Coverage C "any liability arising out of or contributed to by the co-  
 13 mingling of money or the inability or failure to pay or collect any money for any reason,  
 14 including the following:

- 15 1. insolvency;
- 16 2. receivership;
- 17 3. bankruptcy;
- 18 4. liquidation; or
- 19 5. unauthorized or illegal credit card transactions;

20 whether such co-mingling of money or failure or inability to pay or collect money is on the part  
 21 of the 'insured' or any other party." Security has taken the position that Trident's claim against  
 22 Sea'N Air arises from or was contributed to by Tenanglia's failure or inability to repay Trident

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23 <sup>1</sup> Terms in quotation marks are defined in the policy. Of relevance to this coverage dispute is the  
 24 definition of "insured," which includes not only Sea'N Air, but also any employee of Sea'N Air acting  
 25 within the scope of his duties as such. For purposes of this policy, the insurance afforded "applies  
 separately to each 'insured' against whom claim is made or suit is brought . . . ."

1 for the airline tickets he stole. Motion at 14.<sup>2</sup> But Trident's negligence claims against Sea'N Air  
2 arose when Sea'N Air's hiring, supervising, and accounting practices resulted in the losses of  
3 which Trident complains. The state court will have to consider the four elements of negligence  
4 (duty, breach, damages, and causation) in light of Sea'N Air's acts and omissions: Sea'N Air's  
5 liability will stand or fall on its own conduct from 1994 to the time Tenanglia's illegal scheme  
6 was discovered. Although payments by another liable party on the same loss may be relevant to  
7 the calculation of recoverable damages in Trident's suit, they do not alter the fact that Trident  
8 has asserted independent claims against Sea'N Air based on Sea'N Air's own conduct. Such  
9 claims can be proven without reference to Tenanglia's subsequent failure or inability to pay  
10 restitution. The Court finds that Trident's claims of negligent hiring, supervising, and  
11 accounting practices, all of which turn on conduct or omissions that occurred long before  
12 Tenanglia pled guilty and failed to pay restitution, do not arise out of and are not contributed to  
13 by Tenanglia's impecuniary status. To hold otherwise would result in an unreasonable  
14 interpretation of revised exclusion (q) because the exclusion would be triggered every time an  
15 insured or a fellow tortfeasor refused to settle (*i.e.*, failed to pay) a demand and was  
16 subsequently served with a complaint. Since Security's policy prohibits the insured from  
17 making any payments or assuming any obligation related to a claim, an interpretation of  
18 exclusion (q) that would require such payments or risk the loss of coverage for "failure to pay"  
19 is unreasonable when the policy is read as a whole.

20 (3) Because coverage and a duty to defend exist under the professional errors and  
21 omissions provisions of Coverage C, the Court need not determine whether the provisions of  
22 Coverage A would also be triggered by Trident's success in the underlying litigation.

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24 <sup>2</sup> Apparently Tenaglia pled guilty of Wire Fraud in violation of 18 U.S.C. § 1343 and was  
25 ordered to pay \$366,589.71 in restitution. Decl. of Russell C. Love, Ex. 6 at 4-5. Tenaglia has paid only  
a small portion of the outstanding debt. Motion at 4.

(4) Sea’N Air has incurred attorney’s fees because its insurer forced it to appear in this declaratory judgment action in order to obtain the benefits of its insurance contract. An award of attorney’s fees under Olympic S.S. Co., Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 52-53 (1991), is therefore appropriate.

(5) This case comes before the Court in an atypical posture. Defendant Sea’N Air has sought summary judgment in its favor as to plaintiff Security’s claim for declaratory relief. Sea’N Air has not, however, asserted its own claim for declaratory relief.<sup>3</sup> Contrary to Sea’N Air’s argument in reply, it may not obtain through summary judgment relief that was not requested in its complaint or, worse yet, was affirmatively foregone through a stipulated dismissal. See William W. Schwarzer, et al., Federal Civil Procedure Before Trial ¶ 8:197 (2004) (“An answer *cannot* be used to claim *affirmative relief*. In federal practice, a counterclaim must be filed.”) (emphasis in original); ¶ 8:259 (“Thus, if defendant wants the court to determine its rights and obligations on the claim asserted by plaintiff, a counterclaim for declaratory relief is required.”). Although the nature of the relief afforded by this Order is circumscribed by the state of the pleadings, it should be clear from the above analysis that Trident’s allegations, if proven, would trigger coverage under Security’s policies.

For all of the foregoing reasons, Security’s motion for summary judgment is DENIED and Sea’N Air’s cross-motion for summary judgment is GRANTED in part. Security is not entitled to a declaration that its policies do not afford defense or coverage for the claims alleged in Trident’s underlying complaint. Its claim for declaratory judgment is hereby DISMISSED. Sea’N Air is entitled to an award of Olympic Steamship attorney’s fees and shall,

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<sup>3</sup> To be more precise, Sea’N Air dismissed with prejudice its breach of contract counterclaim and corresponding demand for declaratory relief shortly before responding to Security’s motion for summary judgment (Dkt. # 22).

1 within twenty days of the date of this Order, file one or more affidavit and, if necessary,  
2 documents setting forth the costs it has incurred in an effort to compel coverage. Security shall  
3 file its response thereto, if any, within ten days of the filing of Sea'N Air's fee documentation.  
4 To the extent Sea'N Air sought an affirmative declaration that Security's policies cover the  
5 claims alleged by Trident, its motion for summary judgment is DENIED. Sea'N Air dismissed  
6 its claim for declaratory relief regarding Security's defense and coverage obligations and cannot  
7 reinstate it by moving for summary judgment on a claim that is no longer asserted.<sup>4</sup>

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9 DATED this 23rd day of January, 2006.

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12 Robert S. Lasnik  
13 United States District Judge  
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23 <sup>4</sup> The procedural morass created by Sea'N Air's voluntary dismissal of all of its existing claims  
24 for affirmative relief should have very little, if any, practical effect. Sea'N Air has reserved the right to  
25 assert claims of bad faith arising after June 7, 2005 (the date on which this suit commenced). Given the  
26 Court's ruling on Security's motion for declaratory relief, it is difficult to perceive how Security could in  
good faith refuse to indemnify Sea'N Air should Trident prevail in the underlying litigation.